BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 707

DEMURRAGE LIABILITY

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OPENING COMMENTS OF CANADIAN PACIFIC RAILWAY COMPANY

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Canadian Pacific Railway Company ("CP") submits these Opening Comments regarding the Advance Notice of Proposed Rulemaking served in the above-captioned proceeding on December 3, 2010 ("ANPRM").[1] CP strongly supports the Board's stated intention to "adopt a rule or policy statement addressing when parties should be responsible for demurrage in light of current commercial practices followed by rail carriers, shippers, and receivers." ANPRM at 1. This proceeding is particularly important in light of the apparent conflict among federal courts in recent cases regarding the right of carriers to assess demurrage charges against terminals, transloaders, warehousemen and other third parties that fail to return rail cars in a timely manner – a conflict that the Supreme Court recently declined to resolve.[2] CP believes that the Board can, and should, use this proceeding to articulate a reasonable and uniform policy that clearly delineates the circumstances under which intermediaries will be deemed to have notice of, and responsibility for, demurrage charges. Such a policy should reflect both the important role that intermediaries play in the interstate and global freight logistics network, and the responsibility

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[1] CP is a party to the Comments filed by the Association of American Railroads ("AAR"), and endorses those Comments.

[2] CP refers collectively to terminals, transloaders, warehousemen, and other intermediate entities whose demurrage liability is at issue in this proceeding as "intermediaries."

that those entities share with railroads and other transportation providers to promote the efficient movement of freight traffic.

In particular, the Board should disavow the approach recently articulated by the United States Court of Appeals for the Eleventh Circuit, which would allow an intermediary named as consignee on the bill of lading to contest demurrage liability by claiming that it did not affirmatively "assent" to be liable for demurrage charges, or did not have adequate notice that it was the named consignee. *See, e.g., Norfolk Southern Ry. v. Groves*, 586 F.3d 1273, 1276 (11th Cir. 2009). If an intermediary chooses to accept delivery of rail cars with respect to which it is the named consignee, it should not be permitted to exempt itself from the delivering railroad's demurrage rules and practices by the simple expedient of refusing to agree to be bound by those rules and practices. Allowing intermediaries unilaterally to disavow demurrage liability for delays caused by their handling of rail cars is fundamentally inconsistent with "the national need[]" to maintain "an adequate supply of freight cars to be available for transportation of property." 49 U.S.C. § 10746. If an intermediary makes contractual arrangements with the consignor or ultimate recipient of the shipment that make the intermediary an "agent" of such other party, or allocate demurrage liability on a basis that is not apparent on the face of the bill of lading, Section 10743(a)(1) provides a statutory mechanism by which that intermediary can shift responsibility for demurrage charges to such other party.

Section 10746 – a provision that Congress adopted in 1976, after *Eastern Central*[3] and other early ICC decisions discussing intermediary demurrage liability were decided – gives the Board broad statutory authority to establish demurrage rules that serve the national interest in promoting an adequate supply of rail cars. It would be directly contrary to the policies

[3] *Responsibility for Payment of Detention Charges, Eastern Central States*, 335 I.C.C. 537 (1969) ("*Eastern Central*").

articulated in Section 10746 to allow intermediaries (most of whom are sophisticated companies whose primary business is the handling of freight delivered in railcars) to escape responsibility for delays caused by their own actions through the device of claiming that the intermediary did not affirmatively "assent" to be bound by the delivering railroad's demurrage tariff. The Board should resolve the uncertainty created by *Groves* by articulating a uniform demurrage policy stating that an intermediary named as the consignee in a bill of lading who accepts railcars is presumptively responsible for the delivering carrier's demurrage charges, unless such intermediary provides the agency notice prescribed by 49 U.S.C. § 10743(a)(1).

I. DEMURRAGE RULES AND CHARGES ARE ESSENTIAL TO AN EFFICIENT AND WELL-FUNCTIONING TRANSPORTATION NETWORK.

The Interstate Commerce Act ("ICA") recognizes that demurrage charges are a critical component of a well-functioning transportation network. In 49 U.S.C. § 10746, Congress mandated that railroads "shall compute demurrage charges, and establish rules relating to those charges, in a way that fulfills the national needs related to (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property." *Cf. CSX Transp. Co. v. Novolog Bucks Cty.*, 502 F.3d 247, 258-59 (3d Cir. 2007) (holding that § 10746 is a result of "Congress's concern with ensuring that railcars be available for transportation and not sidelined or improperly used as storage facilities"). The Board has jurisdiction to review the reasonableness of demurrage rules or practices established by carriers under Section 10746. *See* 49 U.S.C. § 10702.

Nearly a century ago the Supreme Court recognized that demurrage charges perform the important function of "promot[ing] car efficiency by penalizing undue detention of cars." *Pennsylvania R.R. Co. v. Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920); *see Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Railway Co.*, 271 U.S. 259, 262

(1926) ("The efficient use of freight cars is an essential of an adequate transportation system"). Today, Section 10746 gives the Board a clear statutory mandate to promote demurrage policies that "both compensate[] rail carriers for the expenses incurred when rail cars are detained by shippers and encourage[] the prompt return of rail cars to the rail network by serving as a penalty for undue car detention." *South-Tec Development Warehouse, Inc.—Pet. for Declaratory Order—Illinois Central R.R. Co.*, STB Docket No. 42050, at 3 (Nov. 13, 2000).

Demurrage charges are both necessary and appropriate because railroads, shippers, receivers and intermediaries all share responsibility for maintaining the fluidity of the rail network. The efficient movement of North America's commerce depends upon an adequate supply of railcars,[4] which, in turn, requires that railcars be loaded, unloaded and released promptly so they can be optimally utilized. In 2008 United States railroads originated 30,624,773 carloads using a fleet of just 1,392,972 railcars[5] – which means that each railcar was utilized, on average, in connection with 22 annual shipments. *See* ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS at 24, 51 (2010 edition). Real costs and significant harm are inflicted upon the logistics chain when any participant in that chain holds railcars beyond the time reasonably required to load or unload them. The most effective way to prevent unreasonable delays in handling railcars is to create an economic disincentive to such inefficient behavior. *See Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 797 (1975) ("The evidence indicates that shippers do respond to economic incentives by adjusting their operations to reduce the time necessary for loading."). "[B]y ensuring the prompt turnaround of equipment,"

[4] *Cf. United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 744-45 (1972) (detailing ICC findings regarding adverse effects of freight-car shortages on transportation system); *Chrysler Corp. v. New York Central R.R. Co.*, 234 I.C.C. 755, 759-60 (railroad demurrage policies originally motivated by need to alleviate "severe car shortages").

[5] The 1,392,972 number includes freight cars owned by shippers and leasing companies. *See* RAILROAD FACTS at 51.

demurrage charges both discourage undue delays and compensate car owners for the unreasonable detention of their cars. *Railroads Per Diem – Mileage, Demurrage and Storage Agreement*, 1 I.C.C.2d 924, 934 (1985).

Many customers and intermediaries willingly accept shared responsibility for maintaining the fluidity of the transportation network. CP has had considerable success in recent years in fashioning cooperative arrangements with terminals to reduce delays and improve the flow of traffic. For example, CP and Port Metro Vancouver recently entered into a collaboration agreement "to improve productivity and performance through Canada's Pacific Gateway."[6] In announcing their agreement, the parties stated that "[t]he Port and CP believe that greater collaboration and accountability among supply chain partners is the key to more efficient and reliable trade through the Gateway." *Id.* CP has made similar arrangements with other terminal operators that likewise recognize the need for accountability among all participants in the logistics chain.[7]

While such collaboration agreements can allocate responsibilities contractually among participants in the logistics chain, it is plainly impractical for CP or any other rail carrier to enter into such agreements with every individual shipper, receiver and intermediary. But regardless of how much traffic a customer ships or an intermediary handles, every customer and intermediary with whom a railroad does business shares responsibility for maintaining the fluidity of the rail transportation network by loading, unloading and releasing railcars in timely fashion. CP's

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[6] *See* "Port Metro Vancouver and Canadian Pacific announce productivity and performance agreement" (Feb. 22, 2011), *available at* http://www8.cpr.ca/cms/English/Media/News/General/2010/PMV-and-CP-announce-agreement.htm.

[7] *See* "CP and TSI sign productivity and performance agreement" (June 23, 2010), *available at* www8.cpr.ca/cms/English/Media/News/General/2010/CP+and+TSI.htm; "CP and DP World Vancouver sign productivity and performance agreement" (June 23, 2010), *available at* www8.cpr.ca/cms/English/Media/News/General/2010/CP+and+DP+World+Vancouver.htm.

demurrage program is designed to promote that objective, by creating incentives (in the form of demurrage "credits") for efficient handling of railcars as well as appropriate penalties for failing to return railcars in a timely manner. CP's demurrage rules are revised periodically "[i]n a continual effort to increase fluidity."[8] CP makes an effort to explain clearly its demurrage policies in both its published tariffs and in its interactions with customers. *See Railcar Supplemental Services*, at 5-7 (attached as Exhibit 1).[9] CP has found demurrage to be a critical tool for ensuring the prompt turnaround of railcars and mitigating car shortages.

II. RECENT JUDICIAL DECISIONS THAT CREATE UNCERTAINTY REGARDING THE ABILITY OF RAILROADS TO ENFORCE THEIR DEMURRAGE TARIFFS POSE A SUBSTANTIAL THREAT TO THE EFFICIENCY AND FLUIDITY OF THE RAIL NETWORK.

The ANPRM indicates that the Board's decision to reexamine its demurrage policies was triggered by the "tension in the federal courts of appeals regarding the liability of warehousemen and similar third-party car receivers for railroad demurrage." ANPRM at 2. The Board's decision to review demurrage practices in the wake of recent federal court decisions is appropriate, because inconsistency in those decisions has created an intolerable situation that threatens the uniform application of demurrage rules and charges across the North American rail system. In particular, the Eleventh Circuit's formalistic contract-based approach – under which rail carriers may not assess demurrage charges against an intermediary named as consignee in the bill of lading unless it affirmatively "assents" to assume demurrage liability (or, at a minimum, receives adequate prior notice of its consignee status) makes it impossible for rail carriers to rely on the bill of lading to determine the party responsible for demurrage charges, and enables

[8] *See* "Changes to CP's Supplemental Services Tariffs – Effective January 1, 2011" *available at* www8.cpr.ca/cms/English/Customers/Existing+Customers/Bulletins/2010ProductChanges.htm.

[9] Available at www8.cpr.ca/cms/English/Customers/Existing+Customers/Bulletins/default.htm.

intermediaries to shirk responsibility for delays in the return of cars to the national rail network that are caused by the intermediary's own inefficient behavior.

A. The *Eastern Central* Approach to Intermediary Liability

In many cases, assessing demurrage is a relatively straightforward exercise – the consignor (*i.e.*, shipper) is responsible for delays at the origin and the consignee (*i.e.*, receiver) is responsible for delays at the destination. But the task becomes more complicated where rail movements involve intermediary entities such as terminals, warehousemen or transloaders. The traditional common law rule was that intermediaries could not be liable for demurrage charges solely on account of their handling the freight.[10] However, where an intermediary was listed as the consignee on the bill of lading and accepted delivery of a shipment, that designation was recognized as a lawful basis for holding the intermediary responsible for demurrage.[11]

More than forty years ago, the Interstate Commerce Commission ("ICC") addressed the question whether an intermediary that is not listed as the consignee on the bill of lading may nevertheless be held responsible for demurrage charges. *See Responsibility for Payment of*

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[10] *See, e.g., Middle Atlantic Conference v. United States*, 353 F. Supp. 1109, 1118 (D.D.C. 1972) ("Before such transportation-related assessments as detention charges can be imposed on a party on a prescribed basis there must be some legal liability for such liability outside the mere fact of handling the goods shipped."); *New York Board of Trade v. Director General*, 59 I.C.C. 205, 209 (1920) (noting that "the courts have decided that the steamship company is not a party to the contract of transportation over the rail lines and can not be held liable by the rail carrier for demurrage").

[11] *See CSX Transp., Inc. v. Novolog Bucks County*, 502 F.3d 247, 254-55 (3d Cir. 2007) ("[T]he consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus it is subject to liability for transportation charges even in the absence of a separate contractual agreement or relevant statutory provision."); *Louisville & Nashville Ry. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 70 (1924) ("if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later"); *In re Tidewater Coal Exchange*, 292 F. 225, 234 (S.D.N.Y. 1923) (Hand, J.) ("It is indeed settled that the consignee of goods shipped by a carrier becomes liable for the freights established in its tariffs, regardless of his knowledge of their amount, or of any agreement between the parties.").

Detention Charges, Eastern Central States, 335 I.C.C. 537 (1969) ("*Eastern Central*"). In *Eastern Central*, the ICC held that tariffs designed to place responsibility for detention charges on the party that caused the delay were unlawful to the extent that they purported to impose liability on persons who were not parties to the contract of transportation. *Id.* at 540-41. The ICC concluded that an intermediary who is not named as consignor or consignee in the bill of lading, and is not otherwise a party to the transportation contract, cannot be involuntarily held liable for demurrage charges. *See id.*

Eastern Central was affirmed by a three-judge district court in *Middle Atlantic Conference v. United States*, 353 F. Supp. 1109, 1114-15 (D.D.C. 1972).[12] In doing so, the *Middle Atlantic* court held that liability for detention charges must be "founded either on contract, statute, or prevailing custom." *Middle Atlantic*, 353 F. Supp. at 1118 (emphasis added). In *Middle Atlantic*, no party argued that intermediaries could be held liable for demurrage charges on the basis of prevailing custom. Moreover, the Interstate Commerce Act, as it existed at that time, did not contain any provision explicitly governing the calculation of demurrage charges. *See id.* at 1120 ("There is no claim here that any custom is applicable and the only statute that could conceivably be said to deal with these matters is Section 223 of the Interstate Commerce Act.").[13] However, as discussed below (at p. 22-23, *infra*), Congress did not

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[12] Because *Middle Atlantic* involved review of an ICC determination on the lawfulness of a tariff, the court was bound to defer both to the agency's policy judgments and to its reasonable interpretation of the Interstate Commerce Act. *See, e.g., Investment Company Institute v. Camp*, 401 U.S. 617, 626-27 (1971) ("It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[13] Section 223 of the Interstate Commerce Act, the predecessor to current Section 10743, set forth a procedure for a consignee agent to disclaim liability for certain transportation rates. Like the ICC in *Eastern Central*, the *Middle Atlantic* court found that a statute allowing an agent that is named as consignee to avoid liability for transportation charges by notifying the carrier of the

promulgate the predecessor to current Section 10746 until the Railroad Revitalization and Regulatory Reform Act of 1976. Finding no statute or prevailing custom upon which intermediary liability for demurrage charges might be based, the *Middle Atlantic* court concluded that such liability could only be imposed via a contract to which the warehouseman was a party. Because the intermediary in that case was not the named consignee in the bill of lading, the court affirmed the ICC's determination that demurrage charges could not be applied to that intermediary. *Id.* at 1120.

Importantly, the *Middle Atlantic* court recognized that the bill of lading is not the only possible contractual basis for imposing demurrage liability. *Id.* (parties "are perfectly free among themselves to contract with respect to the payment of demurrage"). In addition, the court considered whether the economic benefits that warehousemen might derive by detaining a railcar beyond a reasonable unloading time might give rise to a quasi contractual relationship on which demurrage liability could be predicated. *See id.* at 1125. The court ultimately declined to find such a quasi contract in the case before it, reasoning that "[w]hile quasi contracts have been created in a variety of situations where one party has clearly bestowed a benefit upon another, we decline to create such a contract here where the unjust enrichment of the warehouseman or other agent is so uncertain." *Id.*

B. The *Groves* and *Novolog* Decisions Create Uncertainty Regarding The Ability Of Rail Carriers To Enforce Demurrage Rules Against Intermediaries.

The *Eastern Central* analysis provided an easily-administrable mechanism for determining when an intermediary could be held liable for demurrage charges. If the intermediary was named as the consignee in the bill of lading without any indicia that the

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responsible principal could not be read to extend demurrage liability to a party that is <u>not</u> named as consignee on the bill of lading. *See id.* at 1120-21.

intermediary was an agent, then the intermediary was liable for the payment of demurrage charges. This rule was fully consistent with former Section 223 (currently Section 10743(a)). Giving the designation in the bill of lading controlling significance enabled both carriers and intermediaries to rely on the bill of lading to determine the party responsible for demurrage charges. As the Board observed in the ANPRM, the *Eastern Central* rule "provided some degree of certainty for several decades." ANPRM at 4.

In several recent cases, however, intermediaries who were named as consignees in the bill of lading challenged that simple rule, claiming that they cannot be held responsible for demurrage charges unless they explicitly agree to assume such liability. *See, e.g., Norfolk So. Ry. Co. v. Groves*, 586 F.3d 1273 (11th Cir. 2009); *CSX Transp., Inc. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007). In *Novolog*, the Third Circuit held that a recipient of freight who is named as the consignee in the bill of lading, and who fails to provide the consignee-agent notice contemplated by Section 10743(a)(1), is liable for demurrage charges. In doing so, the court followed the longstanding rule that emerged from *Eastern Central* and its progeny and rejected a transloader's claim that demurrage liability cannot be imposed on an intermediary unless it affirmatively consents to being designated as the consignee and to assume responsibility for demurrage. *See Novolog*, 502 F.3d at 260-61.

The Eleventh Circuit took a very different approach in *Groves*. There, a railroad sued a warehouseman to collect six months' worth of unpaid demurrage charges on freight shipments for which the warehouseman was named as consignee in the bill of lading. *See id.* at 1275-77. The warehouseman claimed that the consignor had named the warehouseman as consignee without its knowledge or consent, and that therefore demurrage charges could not be assessed against it on the basis of the bill of lading. The Eleventh Circuit agreed, holding that an

intermediary may be held liable for demurrage charges only if it explicitly agrees to be the named consignee. *See id.* at 1282 ("[A] party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly."). The Court indicated that its holding was based on "fundamental" contract principles requiring "a meeting of the minds between the parties" before a consignee may be held liable. *Id.* at 1281. The *Groves* court went so far as to hold that the warehouseman was not, in fact, the legal consignee for the shipments at issue – despite being identified as such in the bill of lading – because it had not explicitly agreed to be named consignee. *See id.* at 1282. The *Groves* approach is thus predicated on the assumption that demurrage liability can arise only via a "contract." That is not correct – as the prior case law holds, demurrage liability may be "founded either on contract, statute, or prevailing custom." *Middle Atlantic*, 353 F. Supp. at 1118.

The patently inconsistent holdings in *Groves* and *Novolog* create great uncertainty regarding the circumstances under which railroads may assess demurrage charges against an intermediary that is the named consignee in the bill of lading, and detains cars beyond the allotted free time set forth in the carrier's demurrage tariff. For now, it does not appear that the conflict between *Groves* and *Novolog* will be resolved judicially.[14] Therefore, it is appropriate for the Board to act to restore uniformity to the rules governing demurrage liability, by articulating policy guidelines that eliminate the uncertainty regarding a railroad's ability to rely

[14] Indeed, it is likely that the possibility that the Board might adopt new rules clarifying intermediary liability was a factor in the Supreme Court's decision to deny *certiorari* in *Groves*. The Court typically does not explain its rationale for denying *certiorari*. However, it is worth noting that the Court initially considered the issues presented to be sufficiently serious that it requested the Solicitor General's views on *certiorari*. The primary argument made by the United States in its *amicus curiae* brief opposing *certiorari* was that the Board had instituted this proceeding and might use it to craft "a default rule . . . for demurrage liability." Br. of United States, *Norfolk So. Ry. Co. v. Groves*, No. 09-1212 (filed Dec. 10, 2010).

upon information provided to it in the bill of lading. Such a policy statement will promote Congress' statutory mandate that demurrage charges "fulfill the national needs relating to (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars." 49 U.S.C. § 10746.

III. THE BOARD SHOULD CONFIRM THAT CONSIGNEES NAMED IN A BILL OF LADING ARE PRESUMPTIVELY LIABLE FOR DEMURRAGE CHARGES.

A. The Rationale of *Groves* Should Be Rejected.

The stark conflict between *Novolog* and *Groves* creates an intolerable lack of uniformity in the applicability of railroads' demurrage rules to intermediaries. As the law stands today, a warehouseman in a Third Circuit state like Pennsylvania who is named as consignee in a bill of lading must either (1) accept the freight and the concomitant responsibility for demurrage; (2) provide the agency notice prescribed by Section 10743(a)(1)[15] in order to shift that responsibility to another party upon whose behalf the intermediary is acting; or (3) refuse delivery of the shipment. In other words, intermediaries in the Third Circuit are subject to the same rules regarding demurrage liability that have applied nationwide for several decades. However, a warehouseman in an Eleventh Circuit state like Georgia is no longer subject to the same obligations. There, a warehouseman can accept freight with little regard for potential demurrage liability – and little incentive to unload and return cars promptly. Even if such a warehouseman is named as consignee in the bill of lading, under *Groves* it can challenge its liable for demurrage charges on the grounds that it did not affirmatively express its "assent" to that designation, or that it did not know that it was the named consignee. It is uncertain whether, in response to additional challenges to demurrage claims by intermediaries, other Circuits will

[15] The Board has asked parties to comment on whether Section 10743 applies to demurrage charges. As discussed *infra* at page 27, CP believes that Section 10743 does indeed apply to demurrage charges as well as line-haul charges.

adopt the well-reasoned holding in *Novolog* or follow the ill-conceived contract theory espoused in *Groves*.

The result is that railroads may no longer be able to rely on the bill of lading to determine the party responsible for demurrage charges when rail cars are detained beyond the prescribed "free time" for loading and unloading. Intermediary parties located in jurisdictions other than the Third Circuit may seek to sidestep responsibility for railcar delays caused by their own inefficient behavior via the simple expedient of declining to "assent" to being named as consignee in the bills of lading for shipments delivered to their facilities, or denying that they knew that they were the designated consignee.[16] Such a result is fundamentally inconsistent with Congress's express directive that carriers establish and enforce demurrage rules and charges that promote the national need to maintain an adequate supply of freight cars. 49 U.S.C. § 10746.

Groves' creation of a "contract" theory that may be invoked by intermediaries unilaterally to absolve themselves of demurrage liability arising from their failure to return railcars in timely fashion is especially troublesome in today's transportation environment, where significant growth in intermodal and multimodal traffic has made intermediary parties such as transloading facilities a critical link in multimodal logistics chains. At the time of *Eastern*

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[16] The comments of the International Warehouse Logistics Association ("IWLA") confirm that, in the wake of *Groves*, many intermediaries now consider themselves to be exempt from any responsibility for demurrage absent an explicit contract with the carrier – regardless of whether the intermediary has been designated as consignee on the bill of lading and regardless of whether it accepts receipt of the shipment. *See, e.g.*, International Warehouse Logistics Association Comments, STB Ex Parte 707 (filed Jan. 21, 2011) (hereafter "IWLA Comments") at 4 ("There should be no liability for demurrage to the railroad by the 3PL Warehouse, regardless of the designation on the bill of lading." (emphasis added)). IWLA's assertion that *Groves* has removed any demurrage liability even for warehousemen named as consignees is particularly ominous, for IWLA is a trade association representing more than 500 third-party warehouse-based logistics providers, *id.* at 2, and according to its website it provides "Legal and Regulatory Advice" to its members on issues such as "demurrage." International Warehouse Logistics Association, *What We Offer, available at* http://www.iwla.com/what.aspx (accessed Feb. 25, 2011).

Central, U.S. railroads handled 2,363,200 trailers and containers of intermodal traffic annually. *See* ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS at 26 (2010 edition) (intermodal traffic numbers for 1970). By 2008 intermodal traffic had increased nearly 500%, to 11,499,978 trailers and containers.[17] *See id.* As a result, undue detention of rail equipment by warehousemen, transloaders and other intermediaries inflicts significant costs on the transportation network.[18] The *Groves* approach undermines the ability of rail carriers to foster the efficient handling of railcars by intermediaries, by enforcing demurrage rules and charges on a uniform basis across their systems.

Groves is equally unsatisfying as a matter of law. The *Groves* court simply glossed over the statutory definition of consignee – "the person named in the bill of lading as the person to whom the goods are to be delivered," 49 U.S.C. § 80101(1)[19] – in favor of its own theory that a bill of lading designation is insufficient to make a receiver a consignee.[20] Under the plain language of Title 49, being "named in the bill of lading as the person to whom the goods are to

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[17] Even in the recessionary year of 2009, railroads handled 9,880,602 units of intermodal traffic, a remarkable increase over 1970 levels. RAILROAD FACTS at 26. More recently, intermodal volumes have trended upward toward pre-recession levels.

[18] As the Indiana Harbor Belt Railroad Company ("IHB") observed in its comments, intermediaries are particularly important because "[t]he intermediaries are the only parties to the transaction that can control all the steps of the transaction." Indiana Harbor Belt Railroad Company Comments, Ex Parte 707, at 2 (filed Jan. 24, 2011). In contrast, IWLA's cryptic assertion that "as 3PL warehouses, our function . . . is outside the transport of the goods" plainly does not comport with the critical role that an intermediary plays in the transportation network. IWLA Comments at 3.

[19] Section 80101's definition of consignee parallels definitions in the Uniform Commercial Code and Black's Law Dictionary. *See* U.C.C. § 7-102(3) ("'Consignee' means a person named in the bill of lading to which or to whose order the bill promises delivery."); Black's Law Dictionary 307 (6th ed. 1990) ("Person named in bill of lading to whom or to whose order the bill promises delivery.").

[20] While *Groves* cited Section 80101(1)'s definition of consignee with apparent approval, *see Groves*, 586 F.3d at 1276 n.3, it went on to claim that a bill of lading designation alone is not sufficient to make a receiver a consignee, without any effort to reconcile the conflict between its holding and the language of Section 80101(1).

be delivered" is sufficient to make a party the "consignee" for purposes of the statute. Moreover, under the plain language of Section 10743(a)(1), a named "consignee" can avoid liability for demurrage charges only by (1) providing the carrier notice of an agency relationship (and identifying the party actually responsible for demurrage) prior to delivery, or (2) refusing the shipment. *See Novolog*, 502 F.3d at 259 (citing 49 U.S.C. § 10743). In the absence of such notice, Section 10743(a) clearly provides that the "consignee is liable." When Sections 10743 and 80101(1) are read together (as they must be),[21] it is apparent that the *Groves* holding directly contradicts Congress' intent (expressed in Title 49) that a party named as the consignee in the bill of lading is presumptively liable for demurrage charges if it does not give the rail carrier notice under Section 10743(a)(1).

Moreover, the *Groves* court's holding that fundamental principles of contract law mandate a finding that an intermediary cannot be subject to demurrage liability unless it affirmatively "assents" to accept such liability is a red herring. *See, e.g.*, *Groves*, 586 F.3d at 1281-82 ("[I]t is a fundamental principle of contracts that in order for a contract to be binding and enforceable, there must be a meeting of the minds on all essential terms and obligations of the contract" (citing Restatement of Contracts and other authorities)). Conduct can manifest assent to a contract just as much as written or oral acceptance can. An intermediary's actions in accepting delivery of freight for which it has been designated consignee is sufficient acceptance of potential demurrage liability to constitute a legally binding obligation. *See* Restatement of Contracts (Second) § 19 (providing that conduct can manifest assent to a contract). This is particularly so where the warehouseman chooses to accept freight with notice of the demurrage

[21] Because statutes are to be construed "as a whole," *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991), the definition of consignee articulated by Congress in Section 80101 is plainly relevant to determining the meaning of consignee in other subsections of Title 49.

terms that will apply. In that situation, the warehouseman's acceptance of the freight manifests assent to those demurrage rules.[22]

B. The Board Should Clarify That The Consignee Named In The Bill Of Lading Is The Presumptive "Consignee" For Purposes Of 49 U.S.C. §§ 10743 And 10746.

The Board should clarify that an intermediary who is named as consignee in a bill of lading cannot avoid responsibility for demurrage charges incurred on railcars that it has accepted and delayed simply by asserting that it did not explicitly "assent" to assume demurrage liability. One way to do so is to issue a policy statement that the Board interprets the term "consignee" in 49 U.S.C. § 10743 to mean "consignee" as defined in 49 U.S.C. § 80101(1). Such a clarification will promote uniformity in the application of demurrage tariffs, rules and charges throughout the national rail system. It will also eliminate the uncertainty created by the inconsistent holdings in *Novolog* and *Groves*, and enable railroads once again to rely upon the information provided to them in the bill of lading to determine the party responsible for payment of demurrage charges on railcars that are not unloaded and returned in timely fashion. At the same time, the proposed clarification of the Board's interpretation of the statute will protect intermediaries who act only as "agents" for an unnamed principal by alerting them to their right to avoid liability by providing to the railroad the information prescribed by Section 10743(a)(1)(A) and (B). Such a clarification would be fully consistent with the principles articulated in *Eastern Central*, with the Interstate Commerce Act, and particularly with the Board's statutory authority to prescribe reasonable demurrage rules pursuant to Section 10746.

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[22] Where the named consignee acknowledges accepting the railcars, but claims not to have received bills of lading from its customers or to have "assented" to being designated as consignee on those bills of lading, it is plainly unfair to allow the consignee to avoid responsibility for delaying railcars simply by failing to apprise itself of the terms of bills of lading for freight cars it was detaining.

A rule that imposes presumptive demurrage liability on an intermediary who is responsible for delaying the return of loaded railcars (unless it notifies the railroad prior to delivery that it is accepting the cars only as agent for a third party and identifies the actual responsible party) would also be consistent with the Board-endorsed general principle that railroads should "recover costs from those that generate them." *North America Freight Car Ass'n v. BNSF Ry. Co.*, STB Docket No. 42060 (Sub-No. 1), at 6 (served Jan. 24, 2007); *see also Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 127 (2d Cir. 1993) ("[R]ailroad accounting principles generally provide that costs should be recovered from the parties that generate them."). There are strong policy reasons for requiring intermediaries whose actions (or inaction) are responsible for delaying the efficient return of rail equipment to incur the same financial penalty as other consignors and consignees who fail to load or unload railcars within the "free time" prescribed in the railroad's demurrage tariff.

Moreover, a holding that the consignee named in the bill of lading is presumptively liable for demurrage charges properly allocates, as between the intermediary and the delivering carrier, responsibility for identifying the party who should pay the demurrage charges. The delivering railroad has no way of knowing the nature of the relationship between a warehouseman listed as "consignee" on the bill of lading and its customers, or the terms of any agreement that might exist between those parties regarding the payment of demurrage charges on cars handled by the intermediary. Conversely, the intermediary, consignor and ultimate receiver do know the terms of their business arrangements, and those parties have the ability to notify the railroad of any agreements that rebut the presumption that the named consignee is the responsible party. If an intermediary has made such an agency arrangement, it should be incumbent on that intermediary

to satisfy the requirements of Section 10743(a)(1) by providing the railroad with notice of that agency relationship, and of the principal who is liable for any demurrage charges.

The Board should likewise clarify that an intermediary who is named as the consignee in the bill of lading, accepts railcars for delivery without providing a notice of agency that complies in all respects with Section 10743, and fails to unload and return those cars in a timely manner cannot avoid liability for demurrage charges simply by claiming that it "did not know" of either its status as the named consignee or of the rules and charges published in the carrier's demurrage tariff. Warehousemen, transloading facility operators and other intermediaries are entities whose daily business activities involve the handling of freight delivered by rail. As such, it is reasonable to assume that they understand fundamental concepts such as the significance of bills of lading, agency arrangements and demurrage. Requiring intermediaries to apprise themselves of the terms of bills of lading for shipments that they receive should not impose a significant burden on them. Indeed, because intermediaries know (or should know) the specific arrangements that they have entered into with their customers – including which party will be responsible for demurrage charges – the receipt of a bill of lading showing the intermediary as the consignee for each individual shipment moving under such an arrangement is, in a sense, redundant. The Board should not adopt a demurrage policy that encourages intermediaries to shirk liability by "sticking their heads in the sand" and failing to ascertain their status in connection with rail shipments handled by their facilities. If the Board reaffirms the historical rule that the consignee shown on the bill of lading is the "consignee" for purposes of Section 10743, intermediaries will ignore the provisions of bills of lading (or of their contractual relationships with consignors and ultimate receivers) at their own risk.

Likewise, the Board should make clear that it will not countenance a refusal to accept responsibility for demurrage charges on the grounds that an intermediary "did not know" about the delivering railroad's demurrage rules and charges. Rail-served intermediaries should be well aware of the demurrage policies of railroads with whom they do business on a regular (if not daily) basis. The demurrage rules of all Class I carriers (and many short lines) are available on the carriers' websites. For example, CP's demurrage rules are explained in user-friendly language in Railcar Supplemental Services Tariff 2, which is posted on CP's website. *See Railcar Supplemental Services*, at 5-7 (attached as Exhibit 1).[23] CP's website offers parties the opportunity to sign up for automatic email updates of any changes in CP's tariff.[24] Other Class I rail carriers likewise make their demurrage policies available on their websites.[25] As a result, in today's digital environment, detailed information regarding a delivering carrier's demurrage policies is only a few mouse clicks away. Most terminal, transload and warehouse facilities are served by only one or two railroads. Requiring intermediaries to familiarize themselves with the

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[23] Available at http://www8.cpr.ca/cms/English/Customers/Existing+Customers/Bulletins/default.htm.

[24] *See* http://www8.cpr.ca/cms/English/Customers/Existing+Customers/Subscriptions/Tariffs.htm.

[25] *See, e.g.*, BNSF, *Extended Equipment Use and Services*; http://www.bnsf.com/customers/support-services/extended-equipment-use-and-services/; Canadian National, *Optional Services – Carload (CN 9000-M), available at* http://www.cn.ca/en/shipping-prices-tariffs-optional-services.htm; CSX, *Quick Guide to Managing Demurrage and Private Storage, available at* http://www.csx.com/share/wwwcsx_mura/assets/File/Customers/Price_Lists_Tariffs_Fuel_Surcharge/8100/CSXDemurrageGuide.pdf; CSX, *The 8100 Tariff – Active and Current, available at* http://www.csx.com/index.cfm/customers/prices-tariffs-fuel-surcharge/tariffs/the-csxt-8100-tariff/the-8100-tariff-active-and-current/; Kansas City Southern, *KCSR General Demurrage Information, available at* http://www.kcsouthern.com/en-us/Customers/Pages/Demurrage.aspx; Norfolk Southern, *Demurrage, Storage Rules and Charges, available at* http://www.nscorp.com/nscportal/nscorp/Customers/Publications/publications.html; Union Pacific, Terms and Conditions: Demurrage (Chargable Events), *available at* http://www.uprr.com/customers/myterms.shtml.

demurrage rules and charges of the railroad(s) that serve their facilities would not impose a material burden on those entities. Indeed, it is likely that most intermediaries are already familiar with the rules and practices of the railroads with whom they regularly do business.

* * * * * *

As the Third Circuit noted in *Novolog*, an intermediary always has a choice: it can (1) accept railcars and subject itself to demurrage charges; (2) avoid liability by providing notice of its agency status and identifying the principal responsible for any demurrage charges; or (3) refuse to accept the shipment and thereby avoid any demurrage liability associated with the shipment. If an intermediary believes that a railroad's demurrage rules or charges are unreasonable, it may avail itself of a fourth option: filing a complaint with the Board challenging the reasonableness of those rules. *See* 49 U.S.C. §§ 10702(2), 11702(b). So long as an intermediary has accepted railcars subject to a bill of lading designating it as the consignee, there should be no legitimate concern that demurrage charges may be imposed on that intermediary unjustly.

In short, the Board can and should resolve the confusion generated by the *Novolog* and *Groves* decisions by making clear that the Board interprets the term "consignee" in 49 U.S.C. § 10743 to mean "consignee" as defined in 49 U.S.C. § 80101(1), and that an intermediary named as consignee on the bill of lading is presumptively liable for demurrage unless it complies with the agency notice requirements set forth in Section 10743(a)(1).

IV. RESPONSES TO QUESTIONS IN THE ANPRM

In the ANPRM, the Board asked for comment on seven questions related to the issue of intermediaries' demurrage liability. While the preceding Comments address several of the questions posed by the Board, CP provides the following further responses to those questions:

- *Describe the circumstances under which intermediaries ought to be found liable for demurrage in light of the dual purposes of demurrage. Notwithstanding the ICC's decision in Eastern Central, is there a reason why we should not presume that a party that accepts freight cars ought to be the one that is liable regardless of its designation on the bill of lading, so long as it has notice of its liability before it accepts cars?*

The dual purposes of demurrage – to promote an adequate supply of railcars and to provide an appropriate penalty for a party's unreasonable detention of another party's railcars – both support treating intermediaries in the same manner as other consignees and consignors. When an intermediary's actions (or failure to act in a timely manner) delay the release of a railcar, the intermediary imposes costs on the delivering railroad and the rail network as a whole. It is entirely appropriate to require the intermediary to bear such costs. *See North America Freight Car Ass'n.*, STB Docket No. 42060 (Sub-No. 1), at 6. By interpreting the term "consignee" in Section 10743 to mean what it says – *i.e.*, the consignee named on the bill of lading – and holding the named consignee presumptively liable for demurrage charges, unless it provides appropriate notice of an agency relationship pursuant to Section 10743(a)(1), the Board will act in a manner consistent with its prior pronouncements regarding the proper allocation of costs.

The ANPRM suggests that the Board may be reconsidering *Eastern Central* and its overall approach to intermediary demurrage liability. *See* ANPRM at 6-7. For the reasons discussed above, wholesale revision of the standards articulated in *Eastern Central* is not necessary to correct the misguided *Groves* approach to intermediary liability. Moreover, adopting a rule that makes any party that accepts physical delivery of railcars liable for demurrage in all instances, regardless of its status on the bill of lading, could itself generate confusion. For example, where the bill of lading names one party as the "consignee" but the car is physically delivered to (and accepted by) a different party, which party should the carrier bill

for demurrage charges? Or, where the bill of lading clearly discloses an agency relationship, should the carrier ignore that information and bill the party to whom the railcars are physically delivered? The clarification proposed by CP in these Comments – under which the party named as consignee on the bill of lading is presumptively responsible for demurrage unless it complies with the agency notice requirements set forth in Section 10743(a)(1) – would provide both uniformity of application of carrier demurrage rules and charges and greater certainty to the parties involved in a rail freight shipment. That standard, which has essentially been followed since *Eastern Central*, has proven to be workable, and there would not appear to be any compelling reason for the Board to adopt an entirely different approach.

Nevertheless, it is worth noting that the legal landscape has changed significantly since *Eastern Central* was decided, in a way that gives the Board even clearer authority to prescribe rules governing demurrage liability. *Eastern Central* was predicated on the notion that the receipt of traffic alone is not sufficient to establish demurrage liability – rather, intermediary liability must be grounded in "contract, statute, or custom." More specifically, the holding in *Eastern Central* that an intermediary could be held liable for demurrage without being designated as the consignee in the bill of lading was predicated, in part, on a finding that there existed no statutory authority for applying demurrage tariffs to intermediaries. *Middle Atlantic*, 353 F. Supp. at 1120. While there was no such statute at the time *Eastern Central* was decided, now there is. In the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Congress added the following language to the Interstate Commerce Act:

> Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property."

Pub. L. 94-210, § 211, 90 Stat. 31, 46 (1976) (codified at then 49 U.S.C. § 1(6)). This statutory language is the predecessor to current Section 10746. While the *Middle Atlantic* court could properly conclude in 1972 that no provision of the Interstate Commerce Act authorized the imposition of demurrage charges against intermediaries, that is no longer the case. Section 10746 makes clear that the test of a reasonable demurrage rule is whether it "fulfills the national needs" related to freight car use and distribution. Under Section 10746, the Board arguably has the authority to determine that the national need to ensure an adequate freight car supply makes it reasonable for rail carriers to assess demurrage charges against intermediaries who detain railcars beyond the allotted "free time." However, for the reasons discussed above, such a rule, while theoretically permissible, could give rise to considerable confusion. On balance, CP believes that it is not necessary for the Board to establish such a rule, and that it instead can correct the confusion created by *Groves* within the framework of existing law.

- *Explain how the paperwork attending a shipment of property by rail is processed and how it gives (or does not give) all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.) notice of the status they are assigned in the bill of lading. For purposes of assessing demurrage, should it be a requirement that electronic bills of lading accurately reflect the de facto status of each party in relation to other parties involved with the transaction? If so, and if electronic bills of lading do not accurately reflect the de facto status of each party in relation to other parties involved with the transaction, please suggest changes that will ensure that they do.*

As a general rule, bill of lading information – including the consignee designation and any "care of" language identifying the consignee as an agent – is prepared by the consignor initiating the shipment and forwarded to the carrier.[26] A railroad has a common carrier duty to deliver freight to the consignee specified in the bill of lading. In most cases, the railroad is not

[26] IWLA's attempt to blame railroads for inaccurate bill of lading designations makes little sense, since in most cases the bill of lading's information on the consignee and any agency designation is provided by the consignor. *See* IWLA Comments at 5.

privy to information regarding the *de facto* status of the parties, or any arrangements pursuant to which responsibility for demurrage charges may have been allocated to a party other than the named consignee. Any requirement that bills of lading (electronic or otherwise) more accurately reflect the *de facto* status of each party in relation to the others would necessarily have to be imposed on the consignor that prepares the bill of lading, because railroads are simply not in a position to know the *de facto* relationships among consignors, consignees, intermediaries and other third parties, and the railroad does not prepare the bill of lading. At most, a rail carrier has the ability to forward the bill of lading information to the consignee, but not to confirm independently that the information set forth on the bill of lading is accurate.

That said, CP does not believe that revisions to electronic bills of lading will resolve the current conflict in the law relating to demurrage liability. The rule of *Groves* – which is now binding law in the three states of the Eleventh Circuit and potentially could be followed by other courts – is that an intermediary can evade liability even if it is identified as the consignee in the bill of lading if that intermediary claims lack of affirmative "assent." The solution to the problem occasioned by *Groves* is to interpret the term "consignee" in Section 10743 as having the meaning ascribed to the term "consignee" by Congress in Section 80101(1).

- *With the repeal of the requirement that carriers file publicly available tariffs, how can a warehouseman or similar non-owner receiver best be made aware of its status vis a vis demurrage liability? Does actual placement of a freight car on the track of the shipper or receiver constitute adequate notification to a shipper, consignee or agent that a demurrage liability is being incurred? What about constructive placement (placement at an alternative point when the designated placement point is not available)?*

As described above, while carriers are no longer required to make tariffs publicly available at the Board, CP and many other railroads (including all Class I carriers) post their demurrage rules and charges on their websites. *See supra* at 19. Such publication is the most efficient and cost-effective way to notify the public (including intermediaries located on a

carrier's lines) of that carrier's demurrage rules and practices. It is certainly reasonable to expect a transportation-oriented business such as warehouse or transloading operator to familiarize itself with the demurrage rules published by a rail carrier with which the intermediary does business on a daily basis. Likewise, when a warehouseman or other intermediary receives cars from a railroad, it is fair to conclude that actual placement of the railcar(s) notifies the receiver that demurrage charges may begin to accrue. (Indeed, the physical placement of a railcar measuring fifty feet or more in length on an intermediary's property is at least as obvious a "notice" as the electronic transmission of a bill of lading.) Whether or not "constructive placement" constitutes adequate notice is likely to be a case-by-case determination turning on the degree to which the receiver can be deemed to have known of the placement of railcars at an alternative location.

- *Describe how agency principles ought to apply to demurrage. Are warehousemen generally agents or non-agents, or are their circumstances too varied to permit generalizations? How can a rail carrier know whether a warehouseman or similar non-owner receiver of freight is acting as an agent or in some other capacity?*

The circumstances that might conceivably apply to warehousemen and their customers are too varied to permit any meaningful generalization about whether warehousemen typically are, or are not, agents. Whether or not an "agency" relationship exists is typically a function of state law, and facts that might give rise to an "agency" relationship under one state's laws might not do so in a different state. Moreover, it is possible (if not likely) that a warehouseman may have different types of business arrangements with different customers, so that it might properly be classified as an "agent" for some customers but not for others.

However, some statements of general applicability are warranted:

First, in every case, the intermediary and its customers – not the delivering rail carrier – are in the best position to define and disclose their relationship. Warehousemen and their customers negotiate the particular terms of their business arrangements (including whether or not

the warehouseman will function as an agent, and which party will be responsible for demurrage charges). The delivering railroad is not a party to those negotiations, and has no way of knowing the terms of the relationship between a warehouseman listed as "consignee" on the bill of lading and its customers.[27]

Second, warehousemen not only know the terms of their relationships with customers, they also have the ability to refuse business if they cannot reach a satisfactory arrangement with those parties. If a warehouseman cannot negotiate acceptable terms regarding responsibility for demurrage with a prospective customer, the warehouseman may elect not to handle that party's freight. And if a warehouseman does not have the capacity to accept cars without incurring demurrage charges, it can make a business decision either to refuse the cars or to accept the cars and the concomitant demurrage liability. A railroad does not have similar choices – rather, it has a common carrier obligation to accept all traffic tendered to it, and to deliver the tendered traffic to the location and the consignee specified in the bill of lading. Because the railroad has a legal obligation to deliver railcars to an intermediary, while the intermediary named in the bill of lading has the option (1) to accept delivery and assume responsibility for demurrage; (2) to negotiate arrangements for demurrage payments with its customer; or (3) refuse delivery of the shipment, it is reasonable to place the burden on the intermediary to notify the carrier of any agency relationship that exists, and to identify the entity that has agreed to be responsible for demurrage, as required by Section 10743(a)(1).

[27] IWLA's assertion that "[a] rail carrier should know the status of the receiving party through its contract with its customer" is nonsense. IWLA Comments at 7. Many shipments do not move under contract, and even for contract shipments a railroad's transportation contracts are not likely to shed any light on the named consignee's agency relationships with third parties.

- *Given the discussions in Hub City and Hall, should § 10743 be read as applicable to demurrage charges at all? The ICC said it was in Eastern Central, but it did so with little discussion. Would general agency principles apply to demurrage liability even if § 10743 were found inapplicable?*

CP believes that Section 10743 is applicable to demurrage charges. While Section 10743 does not explicitly refer to accessorial charges like demurrage, no meaningful distinction can be made between "rates" and "charges" in the context of Section 10743. Section 10102 expressly defines "rate" as "a rate or charge for transportation." 49 U.S.C. § 10102(7) (emphasis added). Consistent with that definition, Congress' use of the term "rate" in Section 10743 should be read to include both a "rate" and a "charge" for transportation imposed by a carrier in connection with a rail movement. Indeed, the predecessor to Section 10743 used the term "transportation charges" where the current version uses "rates for transportation." *See* 49 U.S.C. § 323 (1964). The legislative history of current Section 10743 indicates that "[t]he word 'rates' [was] substituted for 'charges' for consistency in view of the definition of 'rate' in section 10102 of the revised title." *See* 49 U.S.C.A. § 10744 Historical and Revision Notes (1982 ed.) This statement indicates clearly that the term "rates for transportation" in Section 10743 was intended to encompass the full meaning of the term "rates" as defined in Section 10102. The fact that Section 10743 may not have been enacted primarily with demurrage in mind does not change the fact that the statute, on its face, encompasses all transportation charges.

- *If § 10743 is applicable, would the Groves analysis (finding that liability does not attach unless the receiver agrees to accept liability) apply to the underlying shipping rate as well as demurrage charges? If it did, how would such a ruling affect industry practice?*

For the reasons discussed above, the *Groves* analysis is inconsistent with the language of the statute, and therefore should not be followed for any purpose. The situation that the Board describes – in which a consignee accepts traffic but refuses to pay the shipping rate on the grounds that it did not consent to being named consignee – is a potential extension of the *Groves*

court's logic. This potential pernicious consequence is yet another reason for the Board to reject the reasoning of *Groves*.

- *Because the warehouseman or other receiver can reap financial gain by taking on as many cars as possible (and sometimes holding them too long), or by serving as a storage facility when the ultimate receiver is not ready to accept a car, should liability be based on an unjust enrichment theory? The court rejected such an approach in Middle Atlantic, 353 F. Supp. at 1124, principally because it found no benefit to the warehouseman from holding rail cars. Is that finding valid?*

Middle Atlantic's suggestion that an intermediary can reap no financial gain from holding cars for too long is not valid. It should be borne in mind, however, that the result in *Middle Atlantic* was premised on a lack of evidence of unjust enrichment, not a holding that a claim of unjust enrichment against an intermediary cannot be sustained as a matter of law. *Middle Atlantic*'s conclusion rested on the absence of any factual record on which the court could find unjust enrichment. *Middle Atlantic*, 353 F. Supp. at 1125 (reasoning that any unjust enrichment for holding cars too long was "uncertain"). Moreover, as a court reviewing an ICC order that did not address an unjust enrichment argument, the *Middle Atlantic* court could not have – and did not – conduct any independent factual investigation into whether or not a warehouseman that retains railcars beyond the permitted "free time" is unjustly enriched. This Board is not so constrained and has ample evidence on which to conclude that an intermediary that unduly detains railcars may be unjustly enriched by avoiding responsibility for demurrage charges and by gaining the use (without compensation) of railcars as storage facilities.

An intermediary who detains a railcar for an unreasonably long period is withholding an asset that has value both to the railroad that owns the car and to the thousands of shippers along the rail transportation network who depend upon access to a ready supply of freight cars. One can imagine a scenario in which an intermediary chooses to agree with consignors to take delivery of more cars than it can unload within the allotted "free time" in order to maximize its

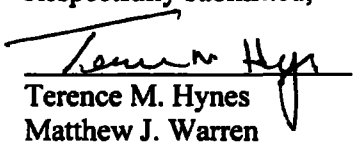
own revenues and/or to deprive a competitor of those business opportunities. It is inequitable on its face for a critical participant in the logistics network to take such actions and impose costs on the network, without bearing those costs. *North America Freight Car Ass'n v. BNSF Ry. Co.*, *supra* at 6. Exempting intermediaries from demurrage liability for delays they cause confers upon them a commercial advantage over other shippers and consignees who are subject to those charges – such a commercial advantage is quintessentially unjust enrichment. Moreover, an intermediary can directly benefit from the ability to avoid demurrage charges by taking as many cars as it can without regard to how quickly those cars can be unloaded. Permitting intermediaries to effectively "stretch" their capacity by accepting more cars than can be efficiently unloaded would allow intermediaries to benefit financially without paying the costs of the network delays that result from such a strategy.

CONCLUSION

For the foregoing reasons, the Board should take action to prevent an intermediary who is named as consignee in a bill of lading from avoiding responsibility for demurrage charges simply by asserting that it did not explicitly "assent" to assume demurrage liability, or that it "did not know" of its responsibilities under the bill of lading or the delivering carrier's demurrage tariff. The Board can accomplish that objective by issuing a policy statement clarifying that the term "consignee" in 49 U.S.C. § 10743 has the meaning given to the term "consignee" by Congress in 49 U.S.C. § 80101(1). Such a clarification will promote uniform application of demurrage rules and charges throughout the national rail system, eliminate the uncertainty created by the inconsistent holdings in *Novolog* and *Groves*, and enable railroads to rely upon the information

set forth in the bill of lading in assessing demurrage charges on railcars that are not unloaded and returned in timely fashion.

Respectfully submitted,



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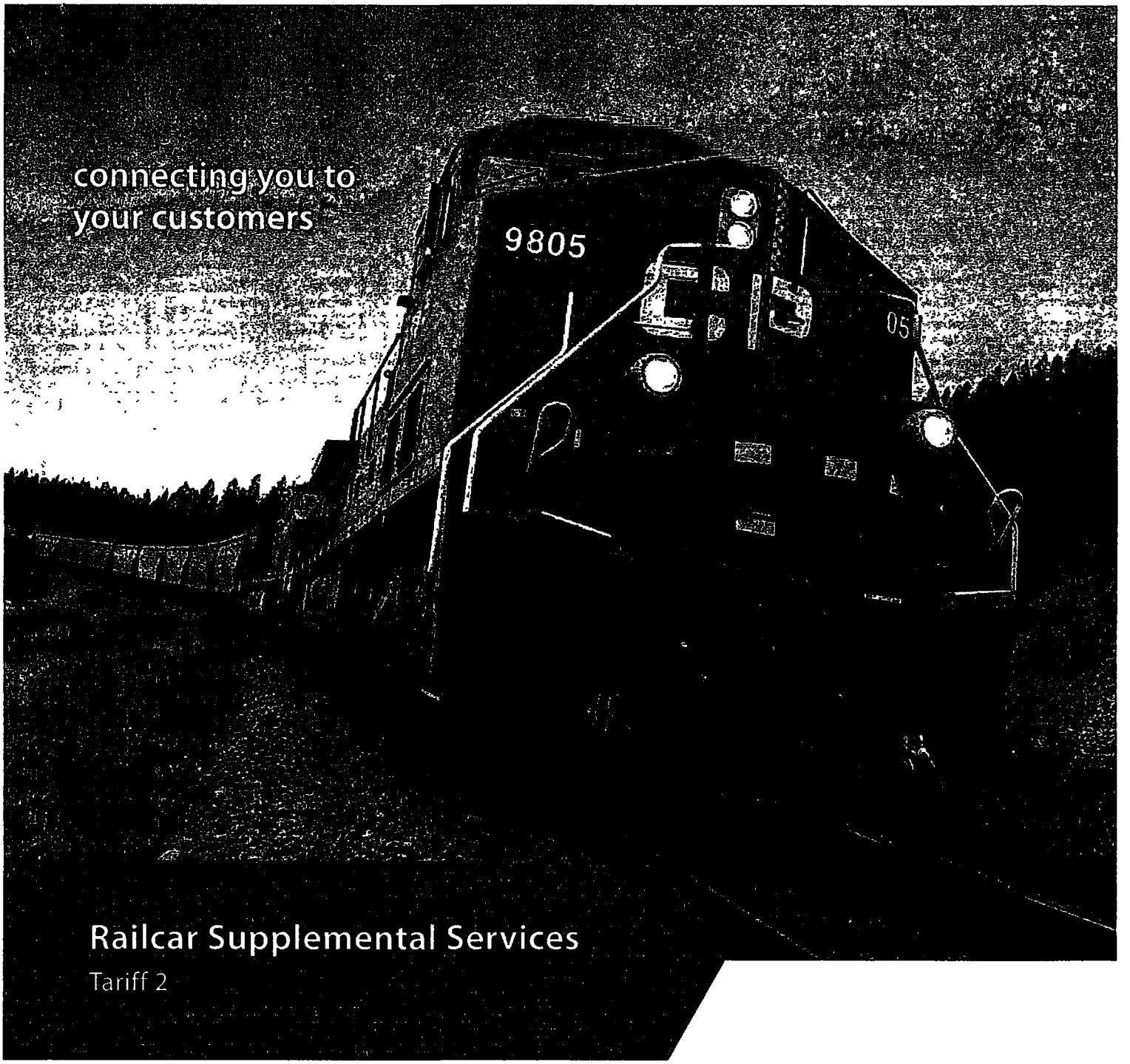
Dated: March 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Opening Comments of Canadian Pacific Railway Company to be served by first class mail, postage prepaid, this 7th day of March 2011, to all parties of records.

Terence M. Hynes

EXHIBIT 1



Railcar Supplemental Services

Tariff 2

CANADIAN PACIFIC

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Revision 20[illegible]
Issued December 1, 2010
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Changes can be identified by these icons

TEXT Wording change

-$ Price decrease

+$ Price increase

Tariff 2 - Railcar Supplemental Services

No matter what you're shipping, we go out of our way to ensure your load gets where it needs to be, when it needs to be there.

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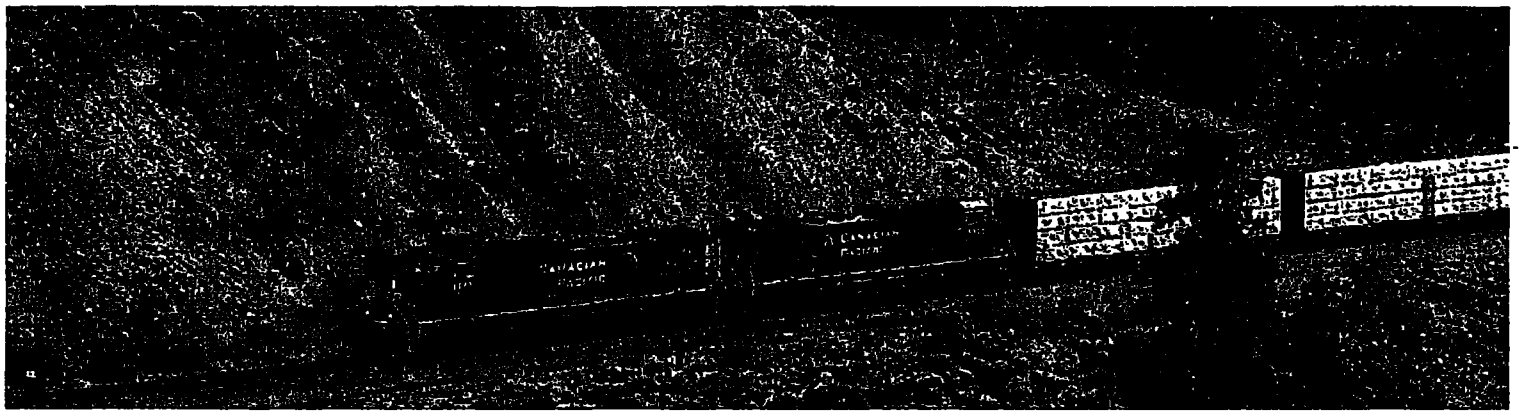

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From time to time CP receives shipping instructions that are rejected due to the quality or accuracy of the information sent. In such situations it is often challenging to correct the mistake. CP will attempt to contact the sender if required.
Should you require assistance with your electronic instructions, our e-Business team can assist you. Please contact them by phone at 1-877-277-3227 or by email at eB_Support@cpr.ca

Changes and corrections *Item 3*

We understand that plans change and sometimes a correction or amendment to the original shipping instructions are required. Because only receipt and execution of the original instructions are included in your quote, we offer the option of making changes. Please contact our Customer Service Team for details at 1-888-333-8111.
After pick-up, should the change you request require changes to the way the car is physically handled while on CP, please see Diversions on page 12.

Cancel before movement *Item 4*

If you have just submitted instructions and need CP to manually cancel them before the car has been moved, you can do so by contacting the Customer Service Operations team.
Please call 1-800-704-4000 for cars in Canada, and 1-888-872-8720 in the US.
Once the car has been picked up by CP, any request that changes the way the car is physically handled would be a diversion.

Non-electronic transactions *Item 5*

When manual services are requested or required, such as receiving shipping instructions in a non-electronic or fax format, administrative work is required to resolve the issue and this incentive is to encourage electronic transactions.

$55.00
per car

Assessed to the shipper, or to the party requiring the service

Customs filing and documentation *Item 6*

Canadian bound shipments not cleared at the border

To effectively move your cross-border shipment to a Canadian destination without regulatory interruption, CP requires Pre-Arrival Review System (PARS) commercial filing in advance of the shipment arriving at the Canadian border for all shipments imported to Canada. This fee applies when the shipment has not cleared Canadian Customs or PARS filing is not in place in before or at the time of arrival at the border. This is in addition to any other fees.

Asset use

Using railway cars and CP track *Item 10*

Efficient asset utilization is a key component of providing low-cost transportation and fluid operations. Rail car dwell, either in railway yards or at loading facilities is inefficient, consumes capacity and is an area where improvements can be realized. Reduced dwell translates into faster, more reliable cycles and better service to you the customer.

CP encourages customers to use railway supplied and private railcars in an efficient manner and we appreciate the cooperation of our many customers who are doing so today. If you choose to use the car longer than is included in your quote, additional time to load or unload a car is available for an additional fee as outlined below. You are encouraged to make use of our e-demurrage system to help you more effectively manage these fees.

Application

Fees for Using Railway Cars & CP Track are payable by the loader or unloader and are applicable to all points on CP. Chargeable time is in full day increments, beginning and ending at the next 00:01hrs local time.

This tariff item will not apply in connection with:

- Unit Trains held as defined in Tariff 5
- Railcars of refused or unclaimed freight to be sold by the railroad for the time held beyond legal requirements.
- Railcars ordered for loading and rejected as unsuitable (bad order, dirty, incorrect car type supplied by CP) within 24 hours after the first 00:01 hours following actual placement.

Notifications

CP Notification to loader or un-loader will consist of railcar initials, number, date and time and will be provided by the railway in writing, by fax, electronically or EDI.

Consignor, consignee or other affected party must furnish the railroad with forwarding instructions, empty railcar release information and other disposition as applicable either in writing, by fax, electronically or by EDI. When notification is provided in writing, by fax, electronically or by EDI by the railroad or the customer, the date and time that the instructions are sent will constitute the date and time of notification.

$87.00

Railway cars "demurrage" *Item 11*

The calculation of demurrage on railway supplied cars is done through debits which are incurred for the time the car is actually held for loading or unloading, offset by credits which are established to allow time to load and unload. Credits and debits are calculated separately for loading and unloading at each location within a calendar month. Credits are earned upon release of the car either from loading or unloading, have no monetary value, and are not transferable.

Railway cars constructively placed or placed for loading will be allowed one credit. Railway cars constructively placed or placed for unloading will be allowed two credits. Net debits will be assessed at a rate of $87.00 per day.

Assigned Fleet Demurrage

Sometimes customers require a specific pool of railway-owned cars that are designated for their specific use. When an assigned fleet is required and there is no Order date in our Delta empty car order system, demurrage will begin with the earlier of PCON or PACT.

Hazardous commodity charge

Cars containing hazardous will be assessed a flat fee of $160.00 per day. This charge is in place to provide a stronger incentive to reduce dwell on dangerous or hazardous commodities.

$57.00

Private railcars

"Your car waiting on CP track" *Item 13*

A private car is a car bearing other than railroad reporting marks which is not a railroad controlled car. Private cars will be calculated on a debit/credit basis. Debits incurred on cars that remain in the yard can be offset by credits earned on cars that are placed more quickly than others. Debits and credits are calculated separately for loading and unloading, have no monetary value and are not transferable. Private cars constructively placed or placed for loading will be allowed one credit. Private cars constructively placed or placed for unloading will be allowed one credit.

If your business requires that you order specific cars, demurrage will be calculated on a straight plan basis. Empty private cars held on CP track will be allowed one free day from constructive placement. Loaded private cars held on CP track will be allowed two free days from constructive placement.

Excess days will be assessed at a rate of $57.00 per day. TIH commodities (loaded or residue) are $1000 per day, including the surcharge below. Excess days will be assessed at a rate of $57.00 per day. TIH commodities (loaded or residue) are $1000.00 per day.

Hazardous commodity charge

For cars containing hazardous commodities a flat fee of $160.00 per day will be assessed. This charge is in place to provide a stronger incentive to reduce dwell on dangerous or hazardous commodities.

$87.00

Private cars on private track

Demurrage is not assessed on private cars while held on private tracks. Private tracks are industry owned tracks or tracks leased from CP for the exclusive use by the loader or unloader.

CP public delivery tracks *Item 14*

Customers who do not have their own facility for loading or unloading may, with CP permission, use a "team track". This track is provided at no cost, but must be shared by all customers using it. At times, CP is unable to place a car on the track, or at a particular location on the track, due to other customers using the track. If this occurs, the loader or unloader is responsible for all demurrage at a rate of $87.00 with the credits as outlined above. CP will advise the customer when the car has been placed.

Railcars held or staged *Item 15*

Railcars held or staged because of a customer request, because they cannot continue moving, or CP's sole discretion deems that they would negatively impact fluidity if they continued moving are afforded no free time or credit and will be assessed the applicable per day or per debit price and surcharge for a private or railway car as indicated in items 11 and 13. If car is removed from a train at an unplanned location, additional switching charges per item 46 & 23 may also apply.

Who pays *Item 16*

Unless agreed in writing that another party will assume responsibility, the Loader of railcar is assessed at origin and the Un-loader of railcar is assessed at destination. The shipper and consignee will be held ultimately responsible should payment not be forthcoming from the Loader or Un-loader.

Credits/free days for industry switching

One additional credit or free day will be earned when a loader or un-loader provides the switching to and from the CP industrial interchange and the loading / unloading facility.

Disputed charges

CP will consider disputes when identified before the invoice is sent or within 30 days of invoicing when entered in the e-demurrage system. We cannot, however, consider any disputes submitted after 30 days from invoice date. Furthermore, disputed items will not be considered justification to withhold payment for remaining items appearing on the same invoice. Please visit www.cpr.ca and log in.

Definitions and glossary of terms

More detail on using railway cars & CP track

Actual placement (PACT) – Date car was actually placed on a customer's private track or CP team track. For debit/credit demurrage, the PACT status will start demurrage liability if not already started by a PCON. For Straight Line demurrage, the PACT status will end demurrage liability.

Constructive placement (PCON) – When a car that is consigned or ordered to a private track, industrial interchange track or other than public delivery track can not be actually placed because of any condition not attributable to CP, such car will be held at destination if it can be accommodated. If not, then held at an available holding area on the railway. A notice shall be provided to the Loader or Unloader that the car is held and that the railway is unable to place the car. This status will usually start demurrage liability.

Debit – Debit is a Demurrage day used in debit/credit calculation

Debit/credit demurrage calculation - Cars RLOD or RMTY sooner than the free time allowed may earn credit days that are used to offset demurrage debit days within the same pattern.

Delta ordered for date (ORDF) – Empty railroad car demand date as entered by shipper into CPR's empty car ordering system DELTA. Demurrage liability will start with the earlier of PCON or PACT, unless the ORDF date is later than the earlier of PCON or PACT, in which case the demurrage will start with the ORDF date.

Demurrage day – Demurrage liability starts the first 00:01 after the applicable start event and ends at the next 00:01. A portion of a day is counted as one day.

Free time (private railcars on debit/credit) – One day free time is allowed for both the unloading of loaded cars and the loading of empty cars.

Free time (private railcars on straight plan) – Two days free time are allowed for the unloading of loaded cars; one day free time is allowed for the loading of empty cars.

Ordered for placement date (ORPL) – Date receiver wants railcars to be actually placed at the loading or unloading track. The demurrage system will add incremental credits from the ordered date to the actual placement date in the event of a service delay or failure.

Per day – starts the first 00:01 after the applicable start event and ends at the next 00:01. A portion of a day is counted as one day.

Pulled from Patron Siding (PFPS) - Date and time a railway physically pulls a load or empty car from a consignor or consignee. For private cars on straight plan in PACT or NOBL status, the PFPS will start demurrage liability.

Release loaded (RLOD) - Date and time loaded billing is received from the shipper. The RLOD status will end demurrage liability.

Release empty (RMTY) - Date and time notification is received from the receiver that unloading is complete and car is available for pick up. The RMTY status will end demurrage liability.

Released without billing (NOBL) – Date cars were released without billing. As a result, demurrage will continue to accrue until such time as billing is received.

Straight plan calculation – Demurrage on some private rail cars is calculated on a car by car basis and no credit days can be earned.

Demurrage patterns:

Loaded railroad cars placed for unloading – Demurrage is calculated on a debit/credit basis with two days free time. Demurrage liability starts with the earlier of Constructive Placement (PCON) or Actual Placement (PACT), and ends with Release Empty (RMTY).

Empty railroad car placed for loading – Demurrage is calculated on a debit/credit basis with one day free time. Demurrage liability starts with the earlier of Constructive Placement (PCON) or Actual Placement (PACT), unless the Delta Ordered for Date (ORDF) date is later than the earlier of PCON or PACT, in which case the demurrage will start with the ORDF date. Demurrage ends with Release Loaded (RLOD) or Release Empty (RMTY) if the car is not used.

Empty shipper assigned railroad car placed for loading – Demurrage is calculated on a debit/credit basis with one day free time. Demurrage liability starts with Constructive Placement (PCON) or Actual Placement (PACT). Because the cars are shipper assigned there is no ordered for date in Delta.

Loaded private car placed for unloading – Demurrage is calculated on a debit/credit basis with one day free time. Demurrage liability starts with the earlier of Constructive Placement (PCON) or Actual Placement (PACT), and ends with Release Empty (RMTY).

Empty private car placed for unloading – Demurrage is calculated on a debit/credit basis with one day free time. Demurrage liability starts with the earlier of Constructive Placement (PCON) or Actual Placement (PACT) and ends with Release Empty (RMTY).

Loaded private car (on straight plan) pulled – This charge is for delay in billing. Demurrage is calculated on a Straight Plan basis with no free time. Demurrage liability starts with Pulled From Patron Siding (PFPS) and ends with Release Empty (RMTY).

Empty private car (on straight plan) pulled – This charge is for delay in billing. Demurrage is calculated on a Straight Plan basis with no free time. Demurrage liability starts with Pulled From Patron Siding (PFPS) and ends with Release Empty (RMTY).

Cars held or staged for other purposes – Demurrage liability starts with Constructive Placement (PCON) and ends with instructions for furtherance.

Storage

Railcars held at your request *Item 17*

Customers may request storage service for empty private railcars, however because of high demand for rail transportation and limited space to store cars, the service may not be available in your area. For more information please speak with your Account Manager about setting-up rail car storage service. Please note that Toxic or Poisonous inhalants are not eligible for storage on CP property.

Unauthorized use

unauthorized use of a railway asset *Item 18*

$2500^{00}
Assessed to the shipper, or to the party who used the asset without authorization

When equipment or a railroad asset is used without authorization, this charge applies. A few examples of situations that would incur this charge:

- Sending a railway car to another railroad without authorization
- Loading or reloading a car without authorization
- Using CP track for loading or unloading without authorization
- A railway or private railcar released or interchanged to CP as an empty where it has been moved beyond the first processing yard and is still partially or completely loaded.

Switching

Your quote includes basic pick-up and delivery performed by CP at your facility and the basic switching and processing to move the rail car to destination through our network as per the original shipping instructions. Should you choose or require additional switching of your car, the following three types of switching are available within CP's network.

$198.00
per car

up to $2,300.00
per block

Assessed to the party requesting, or requiring the service.

Moving a car within a customer facility or industry *Item 21*

Moving a car from one track to another or to a different point on the same track within a customer facility or industry. Sometimes referred to as 'intra-plant' switching.

$60.00
per car
Assessed to the party requesting, or requiring the service.

Moving other cars to execute your request *Item 22*

Sometimes you ask us to perform a service that requires moving other cars, that would not otherwise require movement at that time, out of the way.
Example:
Moving a car that does not have valid shipping instructions in order to access a car with valid shipping instructions.

$462.00
per car

up to $5,027.00
per block

Calgary AB, Chicago IL, Edmonton AB, Milwaukee WI (except within the Menominee Belt Industry), Minneapolis MN, Montreal PQ, St Paul MN, Toronto ON, and Vancouver BC, are $572.00 per car up to $6,292.00 per block

Between St Paul Yard and Minneapolis Yard MN
$825.00 per car up to $9075.00 per block
Car turning $1050.00 per car
$11,550.00 per block

Assessed to the party requesting, or requiring the service

Moving a car within a CP yard or between a CP yard and a local CP served facility *Item 23*

Where a car must be moved or processed within a CP yard or station, or must be moved one way between a local CP yard or station and a local CP served facility. A few examples:

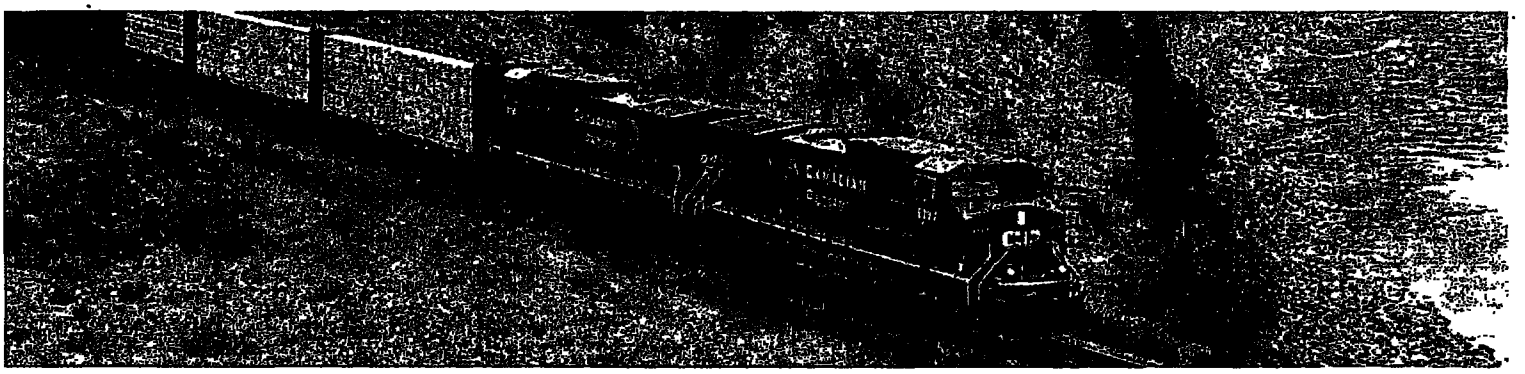
- A car within a CP yard that requires additional movement or processing.
- A car in a CP yard requiring movement to a local CP served facility, such as a car that could not be placed.
- A car at a local CP served facility requiring movement back to a local CP yard, such as an empty car ordered and released without being used.
- A car set-off at an unplanned location requiring switching to be picked up by a train

Before shipping to or from any new location, including "inter-terminal" or "inter-plant" type moves, please speak with your Account Manager to set-up service and obtain a quote. While similar to historic types of switching, this rate is not applicable to shipments moving between customer facilities on CP or moving to or from a local interchange point.

$60.00
per car

Special Switching Requests *Item 24*

Sometimes you ask us to perform a service on a specific car.
Example:
Requesting a specific car ID to be placed at your facility
Requesting a specific car type to be placed at your facility



First and last mile

Last minute changes *Item 30*

Occasionally, some customers need to shut-down their facility or have some other situation that prevents CP from picking-up and/or dropping off cars as planned. Should CP arrive and be unable to access your facility during the regularly scheduled window when our local train has arrived, penalties are applicable. To prevent such a situation, please provide the Customer Service Finance Team with written notice via fax or email at least 24 hours in advance of any planned shutdown.
Please call 1-800-704-4000 for cars in Canada, and 1-888-872-8720 in the US.

+ Switching

Cars moved to a facility that cannot be placed may be subject to fees for the incremental switching to and from the yard (See item #23)

Assessed to the party requesting, or requiring the service

+S **$95.00**
per car
up to $1000.00 per service.

Assessed to the party requesting, or requiring the service.

+S **$55.00**
per car
up to $900.00 per service.

Assessed to the party requesting, or requiring the service.

Unable to place cars at your facility *Item 31*

When CP is delivering cars for a place on arrival customer or has been asked to deliver cars to a place on request customer and is unable to do so for reasons similar to the facility being full or because we are unable to access the facility. Basic Freight includes one movement to the destination facility and one placement so fees for the incremental switching or movement as outlined in the previous section are applicable.

Unable to pick-up cars at your facility *Item 32*

When CP has been asked to perform a specific service for you at your facility, such as picking-up or scaling a railcar, we plan our resources accordingly. In situations where we can access your facility, however a car is not ready or for some other reason we are unable to access a specific car at the requested time, this penalty is applicable. In addition to any asset-use.

Changes to services already requested *Item 33*

After your cut-off, when a change is requested, we may be able to accommodate the change, subject to the availability of resources and capacity. Incremental switching and asset-use charges may be applicable.

Special requests *Item 35*

To request a special switch or special train, please contact our Customer Service Team at 1-888-333-8111.

$275.00
per half-hour
$550.00 for cancellation with at least 24 hours notice, or $1,100.00 with less than 24 hours notice.
Per half-hour or part thereof
Assessed to the party requesting the service

Special switch without new crew *Item 36*

When you get set-up to ship with CP, the regular local schedule will be identified. Should you require service outside your regular schedule, it may be available, subject to the availability of resources and capacity. This rate does not include additional switching within your facility.

$3,850.00
per service
for up to 8 hours

$550.00 for cancellation with at least 24 hours notice, or $3,850.00 with less than 24 hours notice
Assessed to the party requesting the service

Special switch requiring new crew *Item 37*

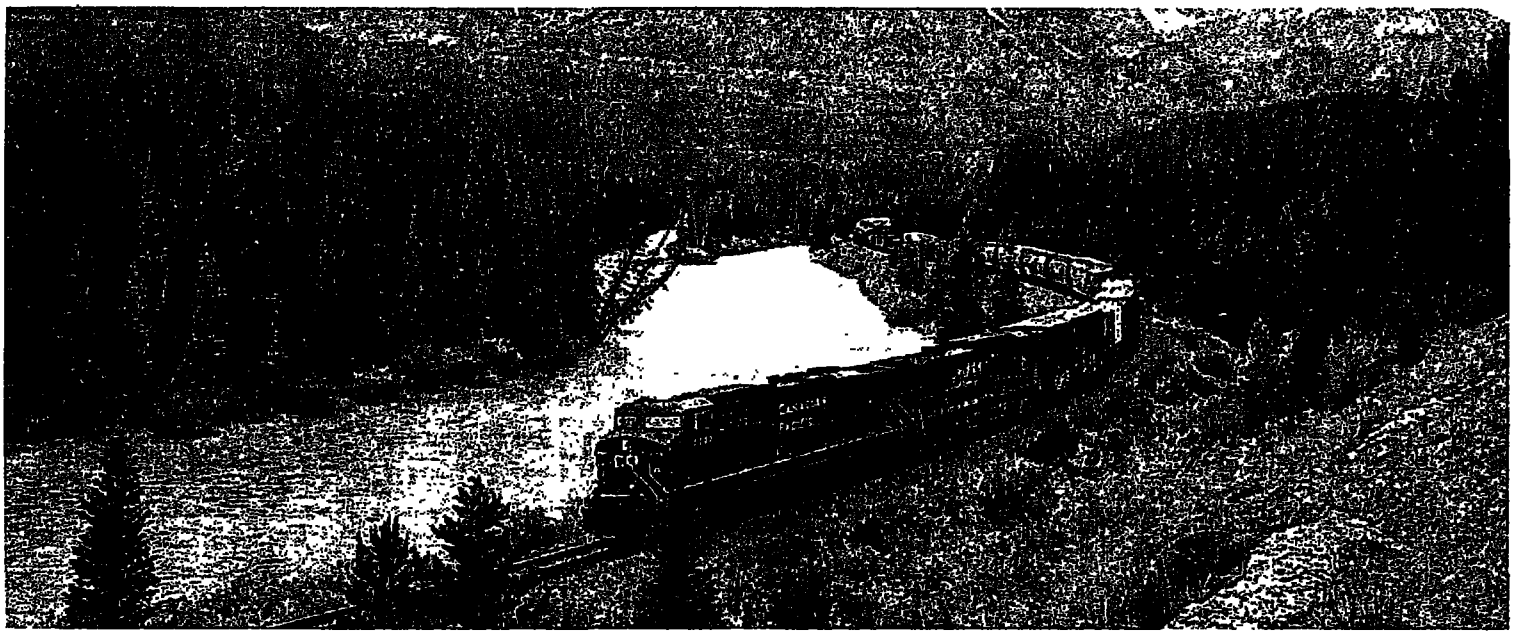
When you get set-up to ship with CP, the regular local schedule will be identified Should you require service outside your regular schedule, it may be available, subject to the availability of resources and capacity. This rate does not include additional switching within your facility.

$125.00
per mile
minimum of 200 miles

$2500.00 for cancellation with at least 24 hours notice, or $25,000.00 with less than 24 hours notice.
Assessed to the party requesting the service

Special train *Item 38*

When you need to have your shipment moved directly to destination, CP offers a direct train service subject to the availability of resources and capacity. This service is in addition to freight and other service fees.



Shipment in transit

A change of plans *Item 40*

While your car is moving, sometimes you need to change your plans. If you are only changing the shipping documentation, please see the appropriate section on page 1. If you are changing the way the car is handled and it will be moving between a new origin and destination you have not used before, please contact your Account Manager to ensure an appropriate quote has been set-up.

$315.00
per car
up to $2,100.00 per block

Assessed to the party requesting the service

The charge for the first diversion of an empty private railcar is under review and suspended until further notice.

Diversion *Item 41*

When you need to change the way we physically handle your shipment to destination while it is on CP, it is called a diversion. CP will only accept diversion requests received in writing by fax or electronically from the party paying the freight charges or their agents.

If a change requires the car to move over track that it has already traveled on during the current shipment the car may be diverted to the next logical terminal. From there new shipping instructions will be required to move the car to the new destination.

Please remember the diversion charge does not include incremental freight charges or any other charges that may accrue as a result of the diversion. Diversion charges will only apply if the diversion is completed, and CP reserves the right to decline any diversion request.

To request a diversion, please contact the Customer Service Team at 1-888-333-8111.

$572.00
per car
up to $6,292.00 per block

If removed from a train at an unscheduled or unplanned location, such as a border crossing, switching charges may also apply to switch the car back onto a train for departure and railcars held or staged, charges may apply while cars are waiting to be switched back on the train

Assessed to the party requiring the service

TEXT Shipment cannot continue in transit

When CP is unable to continue moving your car *Item 46*

There are situations where although we are or would be attempting to move your car, we cannot do so for reasons beyond our control. A few examples where this penalty would apply:

- A regulatory or customs hold.
- A car without full shipping instructions provided prior to or at the time of releasing the car.
- A car that must be removed from a train.
- A car rejected by another railroad at interchange.

In such an event, CP must take additional steps to ensure your car is safely switched out of the way of other traffic so as to reduce the impact on other shipments. Includes power & Unit Train hold fees for the first two hours.

Safety

Ensuring safety *Item 50*

We strive to be the safest railroad in North America. Your responsibilities to ensure safety are outlined on page 15 of CP's Basic Freight, Tariff 1. While it is your responsibility to ensure that your shipment is properly loaded, and your facility is safe for both our employees and your own, we have a dedicated team that is ready to help you ensure your car is transported safely and your facility meets CP's high safety standards.

CP's Customer Safety Handbook is an excellent resource to help you ensure you're working safely. Please visit us at cpr.ca and start using it today.

$3,000^{00}
Non-TIH Hazardous Commodities or Residue $5,500.00 TIH Commodities or TIH Residue $10,000.00

Assessed to the party requesting or requiring the service

Unsafe or improperly loaded *Item 51*

This penalty charge is for the management and coordination of the existing and emergent problem, excluding other applicable charges. Some examples of an unsafe or improperly loaded car where this penalty would apply:

- A car that has been overloaded, is imbalanced, or has a shifted load.
- A car spilling, leaking, or dusting.
- A car containing hazardous commodities or residue identified moving on CP for which shipping instructions were not regulatory compliant.

Cost + 25%
minimum $1000.00
Hazardous Commodities or Residue minimum $2,000.00

Assessed to the party requesting or requiring the service

Major adjustment *Item 52*

Where CP is coordinating provision, or providing more than a simple task relating to equipment or a shipment, this charge applies in addition to other applicable charges. A few situations where this charge would apply:

- Readjusting, reducing, loading, or unloading a shipment.
- Repairing or cleaning equipment, or clean-up of leaked/spilled materials.
- Applying sprays or suppressants to the shipment or contents.

+S $287^{00}
per car
Assessed to the party requesting or requiring the service

Minor adjustment or inspection *Item 53*

Where CP provides a minor service that should have been taken care of by you or a party related to your shipment, this charge applies. A few situations where this charge may apply include closing gates, doors, or hatches, applying a seal, inspecting a car, etc.

Service Suspended
Suspension of rail service until condition is rectified to the satisfaction of CP safety personnel

Plus $10,000.00 for reoccurrences

Assessed to the facility

Unsafe condition at customer facility *Item 54*

Where at CP's sole discretion safe railway operations are not possible because of an extreme or "Risk Level A" condition identified in the areas in which CP performs work within a customer facility, this penalty applies.

Risk Level A is a condition or practice likely to cause permanent disability, loss of life or body part and/or extensive loss of structure, equipment or material, or repeated and/or multiple unresolved conditions or practices that may have a safe work-around.

$300^{00}
per car
Assessed to the billable party

TEXT Unsafe or improperly loaded at unloading facility *Item 55*

This penalty applies when an improperly loaded car has been identified at the time of unloading. Additional fees may apply if the railcar requires inspection or adjustment

Weights

Weights of your car *Item 60*

Please see CP's Tariff 10 for details on scale test services.

+$ **$277.00**
per car
at a CP 'hump' scale
$444.00 at a CP 'flat' scale
$116.00 at a private scale

All weighing prices are per weighing. Assesed to the party requesting the weight

Weighing a car *Item 61*

When a car is weighed or re-weighed by CP at the request of the customer the charges below are applicable each time the car is weighed. Excludes applicable switch charges required when weighing at a flat scale, or additional freight charges if the scale is out of the direct route of the shipment. If a car is shipped with an estimated weight, fees from a connecting carrier may be passed through to determine the actual weight.

+$ **$106.00**
per car
Assessed to the party requesting the weight

Weight requests *Item 62*

When weighing was not requested at the time the car was tendered and CP has weighed the car through normal operations, weight information may be requested, and this charge would be applicable where weight is not used in the assessment of freight.

Miscellaneous

Government imposed fees *Item 70*

While moving your car as requested, there are various government imposed charges that we may incur. Other charges not listed here, will be passed through with up to a 25% surcharge for administration and handling. Environmental surcharges apply as listed in tariff 9800.

$9.75 CAD
per car
$8.25 USD per car

Assesed to the payer of freight vid the freight invoice

Customs user fee *Item 71*

On all cross-border traffic entering the United States, a Customs User Fee is imposed by the US Government, and will be charged to the payer of freight. This fee does not apply to a shipment bonded through the US for return to the country of entry.

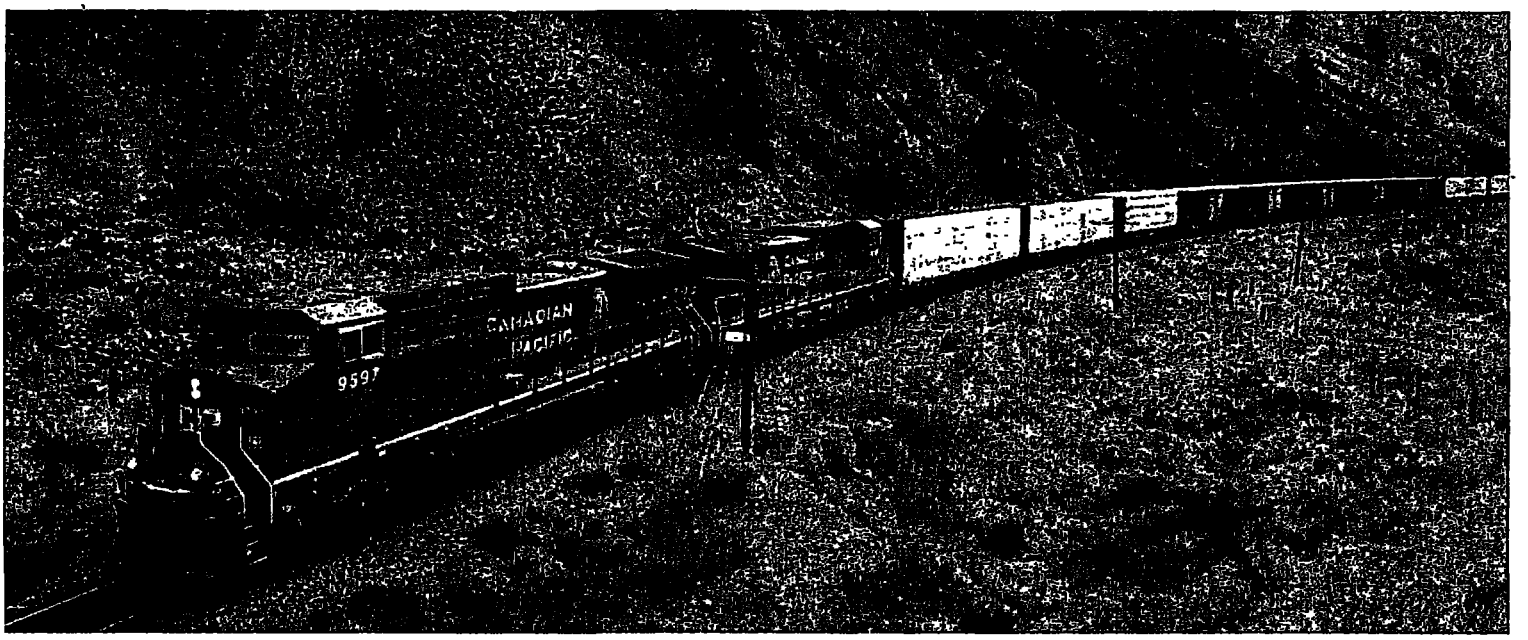
$7.75 USD
per car
Assesed to the payer of freight via the freight invoice

Animal Plant & Health Inspection Service (APHIS) *Item 72*

On all cross-border traffic entering the United States, an Animal Plant and Health Inspection Service (APHIS) fee imposed by the US Government is applicable, and will be charged to the payer of freight.

Special service charge *Item 80*

CP may be able to assist you with a service that requires incremental effort beyond that which is normally provided. When you ask us to put our ingenuity to work for you in this capacity an additional fee will apply. Before provision of the special service, the specifics of the service and the applicable fee will be discussed and agreed to in writing.



Payment & disputes

Services related to payments *Item 90*

Upon receipt of a CP invoice, please ensure that you pay the charges within the standard credit terms as outlined on the invoice. Payment of undisputed amounts must be received by CP before the end of business day on the due date shown on the invoice.

$131.00
per shipment
See changes or corrections on page 4 for details

Incorrect bill - to party provided *Item 91*

Should the original shipping instructions include the incorrect bill-to party, a change to the shipping instructions is required.

$525.00
per block

Assessed to the shipper or party making the request

Manual transaction *Item 92*

When manual services are requested or required, or when required information is not received, administrative work is required to resolve the issue.

$55.00
per transaction

Assessed to the party requesting or requiring the service

Non - payment consequesnces *Item 93*

12%
per annum
Added to the invoice amount

Immediate and short-term non-payment *Item 94*

Interest applies to all overdue amounts.

Suspension of credit privileges

$100.00 processing surcharge for each shipment paid for with cash or credit card

Serious and repeated non-payment *Item 95*

Failure to maintain your accocunt fully paid and up-to-date as agreed will result in the suspension of credit. For customers without credit in the US, Tariff 10 deposit account applies.

Guide to combinations *Item 99*

You may require a service that involves more than one block of work. The following table will help illustrate how the blocks or individual services can be combined to fulfill your more complex request or requirement:

Once Known As	Is Now	$	Notes
No-Bill	Cannot Continue Transit	$572	+ online demurrage
Customs 'Hold'	Cannot Continue Transit	$572	+ online demurrage
Customs 'Set-off'	Cannot Continue Transit + Moving a car within a CP yard	$572 $462 $1,034	+ online demurrage
Shipment Cannot Continue In Transit	Shipment Cannot Continue In Transit	$572 per car	+ online demurrage + moving a car within a CP yard or between a CP yard (a car set off at an unplanned location requiring switching a shipment to be picked up by a train)
Car Cleaning	Major Car Adjustment	$1,000	Cost + 25%, min $1000
Clean-up of non-hazardous spill or reworking an unsafe load	Cannot Continue Transit + Unsafe of improperly loaded car + Major car adjustment	$572 $3,000 +>$1,000 >$4,572	+ online demurrage Haz: +5500 / TIH + $10,000 Cost + 25%, min $1000
Stuffing/De-stuffing at border	Major Car Adjustment	>$1,000	Cost + 25%, In addition to the set-off and switching
Close a Door or Hatch	Minor Car Adjustment Or Inspection	$287	
Inspection Of Car	Minor Car Adjustment Or Inspection	$287	
Diversion	Diversion	$315	+ incremental freight price
Paperwork Change, "Bad BOL", or Rejected EDI	Change or Correction to Shipping Documents	$131	
Unable to place a car	Moving A Car Between A CP Yard And A Local CP Served Facility	$462 +$462 $924	*Some locations are up to $572 Switching to and from the yard
Intra-Plant Switch	Switching Within A Customer Facility	$198	+ moving other cars
Car Ordered Not Used	Moving A Car Between A CP Yard And A Local CP Served Facility	$462	*Some locations are up to $572 Private empty cards are subject to demurrage
Switch Within A CP Yard	Moving A Car Within A CP Yard	$462	*Some locations are up to $572
Bad-order switch to repair track	Moving A Car Within A CP Yard	$462	*Some locations are up to $572
CP discovers a car carrying hazardous materials that was billed as non-hazardous	Cannot Continue Transit + Unsafe or improperly loaded car	$572 +$5,500 >$6,072	V online demurrage +$10,000 for TIH

Rules and regulations *Item 100*

For the most complete and up-to-date version of this document and the applicable rules and regulations, please subscribe to notifications by visiting cpr.ca or call 1-888-333-8111 for assistance.

This tariff applies in addition to CP's Basic Freight Tariff 1. Please review Tariff 1 for details on services included in your quite, liability, rules and regulations.

In addition to any other applicable tariff, the prices, charges and rules of this Tariff, as amended from time to time, apply to railcars on Canadian Pacific ("CP"), and will apply in the currency of the country where the event occurs. On shipments moving to or from other railways, all applicable tariffs of the other railways apply on the respective other railways. CP reserves the right to refuse any services in this tariff.

List of tariffs replaced in whole or in part by Tariff 2: 6666, 8888.

(A) Either Shipper, or Consignee, or CP shall be excused from its or their obligations, with the exclusion of obligations related to ensuring safety, under the Contract or applicable tariffs provided that Customer or CP is prevented or delayed in such performance by any event which is unavoidable or beyond its reasonable control, including, without limitation, act of God, act of the Queen's or public enemies, flood, rockslides, landslides, snowslides, washouts, avalanches, storm earthquake, expropriation, fire or explosion, strikes, lockouts, walkouts or other industrial dispute, war, sabotage, riot, insurrection, derailment, labor shortages, power or fuel shortages, the act or failure to act of any government or regulatory body. Lack of funds shall not be considered an event of force majeure.

(B) All time periods provided for in the applicable tariffs shall be extended for a period equal to the period in which the event of force majeure is continuing and so far as reasonably possible, the party affected will take all reasonable steps to remedy the event of force majeure; provided, however, that nothing contained in this paragraph shall require any party to settle any industrial dispute or to test the constitutionality of any provincial, federal, state or local law or regulation. In the event of force majeure, the party affected shall give prompt written notice to the other party describing the event in question in reasonable detail, and such party shall also furnish prompt notice when the condition of force majeure has ended Failure to provide notice shall not preclude a party from relying on the existence of a condition of force majeure.

(C) Specific terms applicable to Asset-Use fees: When it is impossible to load or unload or receive cars from, or make cars available to CP because of strike interference at the point where the loading or unloading is to be accomplished, Asset-use fees under a per-day rate will be charged at fifty percent (50%) of the applicable rate provided that (1) The disruption exceeds 7 consecutive days in duration during one calendar month. (2) CP is notified of such strike interference within 48 hours after such strike action begins. (3) The provisions of this item will not apply to: (a) Inbound cars when the waybills are dated four days after the beginning of the strike interference. (b) Cars for loading when ordered after the beginning and prior to the ending of strike interference. (4) In the event it is impossible for a loader or unloader to get to a car to load or unload due to an earthquake, tornado, hurricane or flood, the Asset-Use fees directly chargeable thereto will be eliminated, provided the disruption exceed forty-eight (48) hours in duration, and a claim is presented in writing to CP within the terms of the applicable invoice.

This document and the associated documents outlining supplemental services will be updated from time to time with 30 days notice of any price increase The provisions of this tariff shall supersede those published in other CP tariffs, all of which are incorporated and applicable by reference, unless specifically noted otherwise in the other tariff, and shall not supersede those published in contracts which are specific to either customers or locations on CP. When reference is made a tariff, to items, notes, rules, other tariff(s), etc, such references are continuous and include supplements to and successive reissues of such.

Definitions

CP cars or railway cars shall extend to cars owned by CP and, or operated similarly by other railways, unless stated otherwise.

Local facility or 'local CP served facility' shall apply to a maximum distance (as the track lies) of 40 miles. The shipper and consignee will be held ultimately responsible should payment not be forthcoming from another party.

Party requesting the service shall apply to the party who asks CP to perform a particular service. The shipper and consignee will be held ultimately responsible should payment not be forthcoming from another party.

Party requiring the service shall apply to the shipper until the car moves past the first main rail terminal, to the party paying the freight for shipments up to the point of availability for placement at destination, at which point it shall apply to the consignee, unless stated otherwise. The shipper and consignee will be held ultimately responsible should payment not be forthcoming from another party.

Payer of freight in situations where a railcar is now empty and not moving as a revenue shipment, shall apply to the previous payer of freight for the last loaded movement, unless otherwise stated. The shipper and consignee will be held ultimately responsible should payment not be forthcoming from another party.

Per block or maximum charge is applicable for the greater of up to 150 physically consecutive cars or a "unit train" with the same destination at the time the service is provided, e.g. moving 40 cars from one track, to another track while maintaining the same sequence of cars.

TIH, PIH, Hazardous Commodity are as defined in CP Tariff 8.